

UNITED STATES BANKRUPTCY COURT
NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN RE:)	CHAPTER 11
)	
BRAMLETT PLUMBING, INC.)	CASE NO. 05-73925-MHM
)	
Debtor)	

IN RE:)	CHAPTER 11
)	
C&D BUILDERS)	CASE NO. 05-73937-MHM
)	
Debtor)	

**ORDER DIRECTING RETURN OF RETAINER
PAID TO MOORE & CUBBEDGE, LLP**

On August 1, 2005, Debtors filed an application to employ Moore & Cubbedge, LLP ("M&C"), as accountants for Debtors (the "Application"). The Application disclosed that Debtors had paid M&C a prepetition retainer. In the Application, the amount of the retainer was set forth as \$10,000, but in the accountant's affidavit, which accompanied the Application, the amount of the retainer was set forth as \$5,000.

On August 9, 2005, following entry of an Order and Notice of Deficient Filing, Debtors filed a one-sentence pleading withdrawing the Application. That pleading, however, did not address or explain the disposition of the retainer paid to M&C. By order entered August 12, 2005, Debtors were directed to file a report disclosing the actual amount of the retainer and its disposition.

Debtors filed the required report August 19, 2005. Debtors disclosed that a retainer in the amount of **\$15,000** was paid to M&C by certified check from Debtor Bramlett Plumbing, Inc. Debtors also disclosed that the check was deposited to M&C's account and was applied by M&C to outstanding prepetition fees and finance charges owed by Debtors for April, May, June and July, 2005.

The classic "retainer" fee is a fee earned by an attorney by agreeing to be "on call" for the client. Formal Advisory Opinion 91-2, State Bar of Georgia, September 20, 1991. In this jurisdiction, however, and especially in the bankruptcy court, the term "retainer" is used to denote prepaid professional fees, i.e. amounts paid by clients with the understanding that the fees are earned at the agreed rate of performance or upon completion of the task for which the professional is hired. *Id.* A client is entitled to the return of prepaid fees if the professional does not earn the fee. *Id.* See, *In re Renfrew Center of Florida, Inc.*, 195 B.R. 335 (Bankr. E.D. Pa. 1996), for "primer on retainers."

As set forth in the State Bar of Georgia Formal Advisory Opinion No. 91-2 (1990), "retainers" which represent advance fee payments must be placed in the client's trust account, to be withdrawn only when earned. The majority position in bankruptcy case law is that such retainers are property of the estate and must remain in the trust account until entry of an order allowing payment of fees. See, *In re Printing Dimensions, Inc.*, 153 B.R. 715 (Bankr. D. Md. 1993), and cases cited therein. The retainer is property of the estate until the fees are earned **and** approved by the bankruptcy court. *In re Bicoastal Corp.*, 118 B.R. 855 (Bankr. M.D. Fla. 1990) (J. Paskay).

M&C's deposit of the retainer check and application of the retainer to pre-existing unpaid fees was improper. M&C's unpaid fees would have otherwise constituted an unsecured claim against the estate and, thus, the payment of those fees immediately prepetition would likely have been, in whole or in part, an avoidable preference. More importantly, however, because the payment to M&C was characterized to the court in the Application as a retainer for services **to be** rendered during the bankruptcy case, the conversion of the retainer into payment of pre-existing fees without disclosure or approval of the bankruptcy court violates 11 U.S.C. §330, which provides for payment of fees only after notice, a hearing and approval of the bankruptcy court. Accordingly, it is hereby

ORDERED that, within 10 days of the date of entry of this order, M&C shall refund to Debtor Bramlett Plumbing, Inc. the full \$15,000 retainer paid to M&C prepetition.

IT IS SO ORDERED, this _____ day of February, 2006.

MARGARET H. MURPHY
UNITED STATES BANKRUPTCY JUDGE